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Supreme Court, U.S.
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No. 99 - 1823

In the
Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner
v.
WAFFLE HOUSE, INCORPORATED,
Respondent

On Writ of *Certiorari* to the United States
Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIÆ* ASSOCIATED INDUSTRIES OF MASSACHUSETTS, CONNECTICUT BUSINESS AND INDUSTRY ASSOCIATION AND NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission ("EEOC") is precluded from seeking employee-specific relief when the employee has entered into an enforceable agreement to arbitrate employment disputes with his employer?

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iii

Interest of *Amici Curiæ* 1

Statement of the Case 2

Summary of Argument 3

Argument 4

I. This Court Has Already Rejected the EEOC's Argument that Arbitration Agreements Improperly Undermine the EEOC's Enforcement of Federal Employment Discrimination Laws 4

II. The EEOC Does Not Enjoy the Broad Discretion That the NLRB Does to Impose Remedies on Those Violating Employment Discrimination Laws 9

III. The Claimed "Right" to Free Representation by the EEOC Is an Illusory Right 11

IV. Arbitration Resolves Employment Discrimination Claims More Effectively and Efficiently than Litigation 13

Conclusion 18

TABLE OF AUTHORITIES

CASES

Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1974) 11

Amalgamated Utility Workers v. Consolidated Edison Co. of New York,
309 U.S. 261 (1940) 10

Circuit City Stores, Inc. v. Adams,
121 S. Ct. 1302 (2001) 5

EEOC v. Kidder, Peabody & Co.,
156 F.3d 298 (2d Cir. 1998) 7

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 4, 5, 6

Green Tree Financial Corp.-Alabama v. Randolph,
531 U.S. 79, 121 S. Ct. 513 (2000) 4, 13

Phelps Dodge Corp. v. NLRB,
313 U.S. 177 (1941) 9, 10

Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1 (1st Cir. 1999) 17

Southland Corp. v. Keating,
465 U.S. 1 (1984) 13 n.4

Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University, 489 U.S. 467 (1989) 13 n.4

STATUTES

9 U.S.C. § 1 4

29 U.S.C. § 160 (a) 9

29 U.S.C. § 621 et seq. 5

42 U.S.C. § 2000e-4 11

42 U.S.C. § 2000e-5(b) 11

42 U.S.C. § 12101 et seq. 6

RULES

Sup. Ct. R. 37.6 ..... 1 n.1

OTHER AUTHORITIES

Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Claims*, 72 N.Y.U. L. Rev. 1344 (1997) ... 14, 16

Michael Z. Green, *Debunking the Myth of Employer Advantage From Using Mandatory Arbitration for Discrimination Claims*, 31 Rutgers L.J. 399 (2000) 14, 16

Kathleen M. Kelly, *Introduction to the 1997 McGeorge Symposium on Contractual Arbitration*, 29 Mc George L. Rev. 177 (1998) 8 n.2

Claudia MacLachlan, *Employers Winning ADA Suits*, 22 Nat'l L. J. B1, B3 (July 31, 2000) 16

Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29 (1998) 14, 15, 16, 17

Evan J. Spelfogel, *Mandatory Arbitration vs. Employment Litigation*, 54 Disp. Resol. J. 78 (May 1999) 14 n.5, 17

Julie L. Waters, *Does the Battle Over Mandatory Arbitration Jeopardize the EEOC's War in Fighting Workplace Discrimination?* 44 St. Louis U. L. J. 1155 (2000) 7

2 Labor & Employment Arbitration (Tim Bornstein et al. eds. 2001) 15 n.6

hhtp://www.eeoc.gov/stats/all.html 12 n.3

INTEREST OF *AMICI CURIÆ*

Associated Industries of Massachusetts ("A.I.M.") is the largest nonprofit, nonpartisan association of Massachusetts employers with approximately 5,900 members. A.I.M.'s mission is to promote the well-being of its members and their employees and the prosperity of Massachusetts by improving the economic climate of Massachusetts, proactively advocating fair and equitable public policy, and providing relevant, reliable information and excellent services.

The Connecticut Business and Industry Association ("CBIA") is an association of Connecticut businesses whose more than 10,000 member companies together employ more than 700,000 people across the state. CBIA offers its members an array of resources and services related to the legal, economic and social aspects of running a business and it presents its members' views on public policy and legal issues to legislative, regulatory and judicial authorities.

The New England Legal Foundation ("NELF") is a non-profit, public interest law firm incorporated in 1977.[1] Its membership consists of individuals, businesses, and

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1. Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that counsel for neither Petitioner nor Respondent authored the accompanying brief in whole or in part and no person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief. The contents of both parties have been filed with the Clerk of the Court.

others who believe in promoting balanced economic growth for New England, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small businesses from all parts of New England and the United States. NELF has regularly appeared in state and federal court, as party or counsel, in cases raising issues of general economic significance to the business community. See, e.g., Palazzolo v. Rhode Island, 69 U.S.L.W. 4605 (U.S. June 28, 2001); Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000); UNUM Life Ins. Co. v. Ward, 526 U.S. 358 (1999); BMW v. Gore, 517 U.S. 559 (1996); Estados Unidos Mexicanos v. DeCoster, 229 F.3d 332 (1st Cir. 2000); Reich v. Southern New England Telecommunications Corp., 121 F.3d 58 (2d Cir. 1997).

Amici seek to bring to the Court's attention their views, and those of their supporters, concerning the importance of the enforcement of agreements to arbitrate employment disputes and role of the EEOC when an enforceable agreement to arbitrate is in place. *Amici* believe that this brief may provide an additional perspective which may aid the Court in determining whether an employee's enforceable agreement to arbitrate employment disputes precludes the EEOC from seeking employee-specific relief in federal court.

STATEMENT OF THE CASE

Amici adopts the Statement of the Case contained in the Brief of the Respondent Waffle House, Incorporated ("Waffle House").

SUMMARY OF ARGUMENT

This Court has in prior cases rejected the notion that arbitration is inherently incapable of enforcing employees' rights to be free of unlawful discrimination in the workplace. Enforcing mandatory predispute arbitration agreements will not, contrary to the arguments of the EEOC and its *amici*, undermine the enforcement of federal employment discrimination laws nor immunize particular employers from EEOC scrutiny. Under the Fourth Circuit's decision, the EEOC remains free to seek injunctive relief against a discriminating employer to vindicate the public interest and, when necessary, obtain clarification of the law for both employers and employees.

Nor will enforcement of mandatory predispute arbitration agreements impermissibly interfere with the discretion that Congress has given the EEOC to enforce federal employment discrimination laws. Unlike the broad discretion that Congress delegated to the National Labor Relations Board ("NLRB") to prevent and remedy unfair labor practices, the EEOC has not been given direct enforcement powers. The federal courts, not the EEOC, determine the appropriate remedy in an action by the EEOC.

Employees do not have a substantive right to cost-free representation by the EEOC in federal court as the EEOC's *amici* contend. It is the EEOC, not employees, which chooses which cases it litigates in court. Employees have not been given any right to require the EEOC to bring suit on their behalf.

Contrary to the arguments made *amici* the States of Missouri et al., arbitration of employment disputes provides an effective and efficient alternative to litigation for employees and employers alike.

ARGUMENT

I. THIS COURT HAS ALREADY REJECTED THE EEOC'S ARGUMENT THAT ARBITRATION AGREEMENTS IMPROPERLY UNDERMINE THE EEOC'S ENFORCEMENT OF FEDERAL EMPLOYMENT DISCRIMINATION LAWS.

This Court has held that the Federal Arbitration Act, 9 U.S.C. § 1 ("FAA"), sets out a liberal federal policy favoring arbitration to resolve disputes. The purpose of the FAA is to "place arbitration agreements upon the same footing as other contracts." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991). This Court has endorsed this policy favoring arbitration, including agreements to arbitrate "claims arising under a statute designed to further important social policies." Green Tree Financial Corp.-Alabama v. Randolph, 531 U.S. 79, 121 S. Ct. 513, 521 (2000). See Gilmer, 500 U. S. at 24. "[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." Id. at 28. Indeed, this Court recently reiterated its support for arbitration, stating:

> We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. . . . Arbitration agreements

> allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.

Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302, 1313 (2001) (citation omitted). See also Green Tree Financial, 121 S. Ct. at 521 ("We have likewise rejected generalized attacks on arbitration that rest on 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be claimants.'")

Notwithstanding these decisions, the EEOC and its *amici* argue that precluding the EEOC from pursuing employee-specific relief when an employee has entered into an enforceable arbitration agreement will have a devastating impact on the EEOC's enforcement of federal anti-discrimination statutes. See EEOC Brief at 33; Brief of *Amici Curiae* Maryland Commission on Human Relations et al. at 24-28. This Court, however, in Gilmer rejected the argument that the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., precluded arbitration because it "is designed not only to address individual grievances, but also to further important social policies." Gilmer, 500 U.S. at 27. This Court did "not perceive any inherent inconsistency between those policies . . . and enforcing agreements to arbitrate age discrimination claims." Id. This Court also rejected the argument that permitting arbitration of ADEA claims would "undermine the role of the EEOC in enforcing the ADEA," id. at 28, reasoning:

> An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action. Indeed, Gilmer filed a charge with the EEOC in this case. In any event, the EEOC's role in combating age discrimination is not dependent on the filing of a charge; the agency may receive information concerning alleged violations of the ADEA "from any source," and it has independent authority to investigate age discrimination. . . . Moreover, nothing in the ADEA indicates that Congress intended that the EEOC be involved in all employment disputes. Such disputes can be settled, for example, without any EEOC involvement. . . . Finally, the mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration.

Id. (citations omitted).

Neither the EEOC nor any of its *amici* explain why this Court should reach a different result under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101 et seq. Since there is no significant difference between the EEOC's enforcement authority under the ADEA and the ADA, this Court should follow Gilmer. To rule otherwise will

> permit an individual, who has freely agreed to arbitrate all employment claims, to make an end run around the arbitration agreement by having the EEOC pursue back pay or liquidated damages

on his or her behalf [and] would undermine the *Gilmer* decision and the FAA.

EEOC v. Kidder, Peabody & Co., 156 F.3d 298, 303 (2d Cir. 1998).

Moreover, enforcing arbitration agreements will not, as the EEOC argues, "immunize" employers with company-wide mandatory arbitration agreements from EEOC enforcement efforts. See EEOC Brief at 33. Under the Fourth Circuit's decision, the EEOC remains free to investigate and conciliate employee charges of unlawful discrimination in the first instance. Should that effort fail, as it apparently did in this case, the EEOC may seek injunctive relief with its attendant potential for negative publicity for the accused employer. See Julie L. Waters, *Does the Battle Over Mandatory Arbitration Jeopardize the EEOC's War in Fighting Workplace Discrimination?* 44 St. Louis U. L. J. 1155, 1186-87 (2000) ("By allowing the EEOC to seek [injunctive] relief on behalf of the public interest, an employer's discriminating behavior is exposed to the public through the court process."). Accordingly, while Baker's agreement to arbitrate has removed one arrow from the EEOC's quiver, it has not rendered the EEOC powerless to act in the public interest to highlight and remedy unlawful employment discrimination.

Equally unavailing is the EEOC's argument that enforcing an employee's agreement to arbitrate thwarts its ability "to obtain clarification of the law to guide employers and employees alike." EEOC Brief at 36. With the EEOC free to pursue injunctive relief against employers who engage in unlawful discrimination, even

when their employees have entered into arbitration agreements, the EEOC retains its ability "to obtain clarification of the law." Here, Baker's agreement to arbitrate has not thwarted the EEOC's ability to guide Waffle House's conduct if that conduct is shown to have violated the ADA.

Further, the EEOC itself chooses those few cases it actually litigates. See EEOC Brief at26. If, in the EEOC's judgment, an injunction against a discriminating employer will not sufficiently advance the public interest so as to justify its expenditure of resources, the EEOC may decide not to litigate such a case and choose instead to litigate a similar case where it may properly pursue employee-specific relief. Given the sheer number of charges filed yearly with the EEOC, it is unlikely that only a single case in which the employee has agreed to arbitration will involve a novel discriminatory employment practice that needs to be clarified.[2] Yet, even if the practice arose only in one case, the EEOC has other tools at its disposal to educate employers and employees. For example, it may issue guidelines or policy statements to clarify that particular practices are, in its view, unlawful. Accordingly, the occasional presence of an arbitration agreement in a case in which the EEOC would prefer to seek employee-specific remedies, but is precluded from doing so, will not seriously affect the

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2. "The vast majority of individual cases do not raise complex issues of law, but rather call for appliction of established law to facts." Kathleen M. Kelly, *Introduction to the 1997 McGeorge Symposium on Contractual Arbitration*, 29 Mc George L. Rev. 177, 194 (1998).

EEOC's enforcement of federal law.

II. THE EEOC DOES NOT ENJOY THE BROAD DISCRETION THAT THE NLRB DOES TO IMPOSE REMEDIES ON THOSE VIOLATING EMPLOYMENT DISCRIMINATION LAWS.

Amicus National Whistleblower Center argues that the FAA "does not displace the EEOC's administrative authority to determine the appropriate remedy necessary to effectuate federal policy in a discrimination case." National Whistleblower Center Brief *Amicus Curiae* ("Center's Brief") at 4 (heading I). It relies heavily upon Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941), for the proposition that "Congress vested the EEOC with the discretion to determine the relationship between the remedy sought in an action filed by the Commission, and the Commission's obligation to advance the broader public interest." Center's Brief at 6. The Center's reliance on Phelps Dodge is misplaced and ignores the different roles Congress assigned to the NLRB and the EEOC.

The NLRB is authorized to "prevent any person from engaging in any unfair labor practice." 29 U.S.C. § 160 (a).

> Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief. The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described

> unfair conduct in order to remove obstructions to interstate commerce.

Amalgamated Utility Workers v. Consolidated Edison Co. of New York, 309 U.S. 261, 265 (1940). The NLRB has been given broad discretion to maintain and promote "industrial peace." Phelps Dodge, 313 U.S. at 194.

> A statute expressive of such large public policy as that on which the [NLRB] is based must be broadly phrased and necessarily carries with it the task of administrative application. There is an area plainly covered by the language of the Act and an area no less plainly without it. But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review.

Id. It was in the context of the broad discretion Congress delegated to the NLRB to craft remedies to prevent and remedy unfair labor practices that this Court noted that "courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of the law into the more spacious domain of policy." Id.

Congress has not given the EEOC similar authority to prevent or to provide remedies for employment discrimination. "Title VII does not provide the Commission with direct power of enforcement. The Commission cannot adjudicate claims or impose administrative sanctions." Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974). Rather, the EEOC 's role is limited to the investigation and informal resolution of charges of employment discrimination. 42 U.S.C. § 2000e-5(b). If these efforts are unsuccessful, the EEOC may chose to bring an enforcement action in court. 42 U.S.C. § 2000e-4 (f) (1). It is the courts, however, not the EEOC, that have plenary power to enforce federal employment discrimination laws. 42 U.S.C. § 2000e-5 (g). The ADA, like Title VII, "authorizes courts to issue injunctive relief and to order such affirmative action as may be appropriate to remedy the effect of unlawful employment practices. . . . [F]ederal courts have been assigned plenary powers to secure compliance with Title VII." Alexander, 415 U.S. at 45. The courts determine the appropriate remedy, not the EEOC. Accordingly, precluding the EEOC from pursuing employee-specific relief when an employee has entered into an enforceable arbitration agreement does not impermissibly interfere with the discretion Congress granted the EEOC in the enforcement of federal employment discrimination laws.

III. THE CLAIMED "RIGHT" TO FREE REPRESENTATION BY THE EEOC IS AN ILLUSORY RIGHT AT BEST.

The Lawyers' Committee for Civil Rights Under Law argues in its Brief *Amicus Curiae* that Baker's agreement to arbitrate should not be enforced because it amounts to

"a prospective waiver of substantive protections, including the opportunity to obtain relief through an action initiated pursuant to the independent enforcement authority of the EEOC." Brief *Amicus Curiae* Lawyers' Committee for Civil Rights Under Law et al. at 19. In a similar argument, the National Employment Lawyers Association contends that the arbitration agreement at issue here "effects an impermissible waiver of [Waffle House's] employees statutory protections by stripping them of their right under the ADA . . . to seek cost-free assistance of the EEOC in obtaining make-whole relief." Brief *Amicus Curiae* National Employment Lawyers Association et al. at 8. This claimed "right" is not a right that employees have at all.

As the EEOC notes, it picks the few cases it will pursue in court. EEOC Brief at 26. Employees, like Baker, cannot require the EEOC to pursue claims on their behalf and the likelihood of the EEOC bringing an enforcement action on behalf of any individual employee is exceedingly low. According to the EEOC, it filed 439 suits in 1999 and 291 in 2000. EEOC Brief at 26 n.9. The rate at which the EEOC brought suit on behalf of employees who had obtained findings of reasonable cause and had unsuccessful conciliations in 1999 was approximately 9% and in 2000 was less than 5%.[3] The

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3. According to EEOC statistics, the EEOC resolved 97,846 charges in 1999. Of these, 4,837 were unsuccessful conciliations which becme candidates for litigation. hhtp://www.eeoc.gov/stats/all.html. Similarly, the EEOC resolved 93,672 charges in 2000 resulting in 6,208 unsuccessful conciliations. Id.

remote possibility that the EEOC might pursue a claim seeking employee-specific relief does not transform the EEOC's discretion to bring suit into a substantive right that Congress conferred on employees to cost-free EEOC representation.

IV. ARBITRATION RESOLVES EMPLOYMENT DISCRIMINATION CLAIMS MORE EFFECTIVELY AND EFFICIENTLY THAN LITIGATION.

Undeterred by this Court's rejection of "generalized attacks on arbitration that rest on 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be claimants," Green Tree Financial, 121 S. Ct. at 521, the States of Missouri et al. argue that

> the reality is that pre-dispute employment arbitration agreements are often treated with a healthy dose of skepticism.

Brief *Amicus Curiae* of States of Missouri et al. ("States' Brief") at 9. The States' Brief notes that "some legal scholars oppose such mandatory arbitration" and that some states have exempted "employer-employee pre-dispute arbitration agreements from enforcement." Id.[4] The States further contend that the skepticism they report

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4. It is doubtful that such state laws are valid. See, e.g., Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University, 489 U.S. 467, 478 (1989); Southland Corp. v. Keating, 465 U.S. 1, 10-16 (1984).

"is based, in part, on the apparent limitations of the arbitration forum," id., including alleged lack of arbitrator expertise, the possibility that a given arbitrator might ignore the substantive law, and alleged arbitrator bias in favor of employers. Id.at 10-11. These contentions ignore both the evolution in employment arbitration and the results of more recent data on arbitration and litigation outcomes.[5]

Since this Court's decision in Gilmer and the ensuing debate over the wisdom of that decision, many changes have taken place in employment arbitration. See, e.g., Michael Z. Green, *Debunking the Myth of Employer Advantage From Using Mandatory Arbitration for Discrimination Claims*, 31 Ruters L.J. 399 (2000); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29 (1998); Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Claims*, 72 N.Y.U. L. Rev. 1344 (1997). For example, in 1995, an American Bar Association task force, which included members of the American Civil Liberties Union and the National Employment Lawyers Association, "issued a unanimous protocol on arbitral due process." Matlby, supra, 30 Colum. Hum. Rts. L. Rev. at 39. This

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5. The States assert that 70% of employee-plaintiffs are successful in court. States' Brief at 9. They cite Evan J. Spelfogel, *Mandatory Arbitration vs. Employment Litigation*, 54 Disp. Resol. J. 78, 78 (May 1999) for this statistic. While the Spelfogel article does contain this assertion, it cites to no source whatsoever for support. It should be noted that this phenomenal success rate for employees in court is not supported by other studies. See page 16 infra.

protocol has been adopted by the American Arbitration Association ("AAA") and JAMS/Endispute, "by far the largest providers of arbitration services." Id. The protocol includes:

> (a) a neutral and unbiased arbitrator; (b) right of the employee to an equal role in selecting the arbitrator; (c) right to counsel; (d) right to reasonable discovery; (e) identical remedies to those available in court; and (f) a written opinion.

Id. In addition, the protocol " requires that the roster of available arbitrators 'must be established on a non-discriminatory basis, diverse by gender, ethnicity, background and experience.'" Id. at 40 (citation omitted). In response, the AAA "created a new roster of available arbitrators. . . . Only those candidates who were considered fair and impartial by all parties were included on the roster." Id. "It is hard to imagine that the present roster of the federal judiciary . . .would survive this process." Id. Thus, fears that arbitrators lack expertise or are biased in favor of employers are not well-founded.[6]

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6. The AAA's *National Rules for Resolution of Employment Disputes, Arbitration and Mediation Rules*, effective June 1, 1997, require that arbitrators "be experienced in the field of employment law" and require that prospective arbitrators "disclose all information that might be relevant to the standards of neutrality set forth in this Section, including . . . services as a neutral in any past or pending case involving any of the parties." Rule 11 a (i), b, *reprinted in* 2 Labor & Employment Arbitration Appendix 3 (Tim Bornstein et al. eds. 2001).

Indeed, studies show that employees fare better in arbitration than they do in litigation.

> Comparisons of the result rates in arbitration versus litigation reveal that, contrary to what many would expect, employees prevail more often in arbitration than in court. For example, an AAA survey of employment arbitration results from 1993-95 shows that employees who arbitrated their claims won sixty-three percent of the time. In comparison, according to federal district court records for 1994, only 14.9% of the employees who took their claims to court won their cases.

Maltby, supra, 30 Colum. Hum. Rts. L. Rev. at 47. See also Green, supra, 31 Rutgers L.J. at 453-54; Claudia MacLachlan, *Employers Winning ADA Suits*, 22 Nat'l L. J. B1, B3 (July 31, 2000) (American Bar Association study determined that between 1992 and 1997, employers prevailed in 91.6% of ADA cases filed in federal court). Moreover, several commentators have observed that arbitration may be the only realistic avenue for recovery for most employees. "[C]ivil litigation resulting in substantial jury awards is a realisitic prospect for relatively few claimants." Estreicher, supra, 72 N.Y.U. L. Rev. at 1356. As Professor Estreicher explains:

> For the vast majority, a private lawyer cannot be secured and their claims will be addressed, if at all, by overworked, understaffed administrative agencies.

Id. at 1356-57. Accordingly, "arbitration holds the

potential to make workplace justice truly available to the rank-and-file for the first time in our history." Maltby, supra, 30 Colum. Hum. Rts. L. Rev. at 63.

In fact, employees apparently are satisfied by and large with the results they receive in arbitration.

> A survey of employee attitudes with respect to the use of arbitration in employment disputes shows that 83% of American workers favor the use of arbitration instead of courts to settle disputes with management. . . . Most employees surveyed felt that arbitration would make it easier for ordinary workers to obtain a speedy and fair hearing, that it would be far less costly than hiring a lawyer and going to court, and that it was a meaningful substitute under federal civil rights laws.

Spelfogel, supra, 54 Disp. Resol. J. at 81. Thus, despite the EEOC's unwavering opposition to the enforcement of predispute arbitration agreements, both employers and employees benefit from the less expensive and faster resolution of employment disputes such agreements afford.

While the debate over the wisdom of mandatory predispute agreements to arbitrate employment disputes will no doubt continue, that public policy question is for Congress, not the courts, to resolve. And, to date, "Congress has repeatedly rejected legislation that would explicitly bar mandatory agreements to arbitrate employment discrimination claims." Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 10 (1st Cir.

1999) (citing bills introduced in Congress). Unless and until Congress prohibits such agreements, this Court should follow its decision in Gilmer and require all employees who enter into such agreements to adhere to their promises while permitting the EEOC to seek injunctive relief, if warranted, against their employers.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

Associated Industries of Massachusetts, Connecticut Business and Industry Association, and New England Legal Foundation

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